

STATE HOUSING APPEALS BOARD

44 Washington Street

Providence, Rhode Island 02903

Phone (401) 457-1214

Fax (401) 457-1140

kmaxwell@rhodeislandhousing.org

Minutes of the December 15, 2010 Board Meeting

The State Housing Appeals Board (“SHAB” or the “Board”) held a public meeting on December 15, 2010 at the Warwick City Hall.

ATTENDANCE

The following members attended the meeting: Charles Maynard, Nicholas Mocerri, Donald Goodrich, Steve Ostiguy and Chairwoman Mary Shekarchi, Esq. Also present were Steven M. Richard, legal counsel to the SHAB, Katherine Maxwell, and Karen Slavin, administrative staff to the SHAB.

Chairwoman Shekarchi called the meeting to order at 2:09 p.m.

AGENDA ITEMS

1. Review and approval of minutes of SHAB’s September 22, 2010 and

October 12, 2010 meetings

Motion to approve September 22, 2010 minutes passed unanimously. The minutes of SHAB's October 12, 2010 meeting were approved subject to minor corrections.

2. Docket Update by SHAB's Legal Counsel

Mr. Richard noted that SHAB's decision in the matter of Atlantic East v Town of

Narragansett had been appealed to Superior Court.

The status of other matters pending on SHAB's docket were briefly described.

Mr. Richard noted that the receipt of a letter from counsel for the appellant in the matter of Dry Bridge v. North Kingstown. Chairwoman Shekarchi noted that SHAB's public hearing on the Dry Bridge matter had been closed prior to receipt of the letter. The developer's letter and a response letter from counsel for North Kingstown raised matters of attaining sufficient majority of votes to sustain a decision. Mr. Richard discussed two prior SHAB appeals in which similar majority vote issues had been settled by the courts. The Chairwoman further noted that neither Mr. Landry's November 23, 2010 letter nor Mr. Ruggiero's December 6, 2010 response letter raised any new issues that had not been argued before the close of the SHAB's public hearing. The Chairwoman declined to reopen

arguments. However, the Chairwoman confirmed that both letters would be accepted into the record of the case.

3. Entry of SHAB's Written Decision WARM v. Westerly Appeal #2010-01

Mr. Maynard moved to accept the written decision subject to correction of one typographical error. Motion passed unanimously.

4. Bickey Development v. Town of Smithfield SHAB Appeal # 2009-03

Appearing for appellant Bickey, Bruce Thibodeau, Esq. stated that Smithfield had only two reasons for denying the comprehensive permit. The local application had sought 31 condominiums, 25% of which were to be low-to-moderate income housing. Smithfield denied application on grounds that health and safety concerns had not been adequately addressed and the developer had not supplied sufficient evidence to show that the affordable units would be fully integrated with market rate units within the development.

Regarding health and safety, Mr. Thibodeau explained that lengthy documentation concerning sewer impacts of the proposed development had been submitted by the applicant's engineer and there had been many indications that the local board and town

engineer considered the engineering adequate. However, a few days prior to the final public hearing, a heavy rain event caused high alarm at the sewage pumping station to which would serve the development. Because of the uncertainty caused by the pumping station alarm, the local board denied Bickey's application on grounds they could not make positive findings concerning the adequacy of the project's sewage engineering sufficient to protect health and safety. Mr. Thibodeau argued that the problem at the sewage pumping station at issue had since been corrected.

Upon questioning from SHAB members, Mr. Thibodeau confirmed that an adjoining condominium project of similar size and connecting to the same pumping station had been approved a few months after the denial of Bickey's application. SHAB's counsel questioned whether SHAB could consider this evidence since it was not included in the local record. Mr. Thibodeau maintained that the record evidence alone showed that Smithfield could have granted approval subject to conditions and given the applicant time to work on any sewage plan modifications that might be required.

Mr. Thibodeau next addressed the additional reason for Smithfield's denial, namely, the lack of sufficient evidence that the affordable units would be sufficiently integrated with market rate units throughout the development. SHAB members discussed the similarity of this issue to one raised in an earlier appeal, *Atlantic East v. Narragansett*. In that appeal, the issue of market and affordable unit

integration was central. SHAB members noted that unlike Atlantic East appeal, the Bickey application proposed that all units were to be identical.

Mr. Thibodeau further contended that his client's application was consistent with Smithfield's Affordable Housing Plan.

On behalf of Smithfield, Mr. Edmund Alves, Esq. argued that Smithfield's denial was based on very serious concerns about the pumping station's location relative to the flood plan associated with the Woonasquatucket River. He noted that Bickey's application had been denied based on current conditions at the time of the application and further noted that Smithfield had been required by RIGL 45-53-4(a) to render its decision within 120 days. He pointed out that the Smithfield Zoning Board also had local sewer authority, and that authority informed their decision to deny the application. The magnitude of potential sewage problem and the requirement to protect health, safety and the environment compelled Smithfield to deny the application.

On questioning by SHAB members, Mr. Alves argued that the town engineer's concerns about the pumping station were included in the local record. Mr. Thibodeau countered that the client's engineering work validated the applicant's proposal and provided the local sewer authority with valuable data.

To support the finding in the Smithfield decision regarding the lack of sufficient evidence to show that the affordable units would be sufficiently integrated with market rate units throughout the development, Mr. Alves pointed to testimony by the developer that the affordable units could be among the last constructed. Mr. Thibodeau contended that the unit integration matter should be handled a later stage of project review.

Upon deliberations SHAB found unanimously that both parties to the appeal agreed that the subject application was listed in Table 22 of the Smithfield Affordable Housing Plan as a potential site for affordable housing. Upon further deliberation SHAB concluded that record showed that Smithfield had achieved 5.33% affordable housing, not the 10% affordable housing goal requirements.

Regarding health and safety issues raised in the local denial, SHAB members agreed that the sewer concerns were very important but, in light of town's pressing need for affordable housing, the local board could have approved the application as a master plan and required sufficient conditions that would address the pumping station capacity concerns. Chairwoman Shekarchi moved to find that record evidence showed that the local board needed more technical evidence on which to base their decision. Motion passed unanimously. In the related issue of the local decision's consideration of environmental protection, SHAB found unanimously that the local board lacked sufficient technical evidence to support a denial.

Regarding the integration of the affordable units with market rate units, SHAB found unanimously that the local board and officials would have had ample opportunity to ensure affordable and market unit integration at a later time in the hearing process had they not denied the application.

The Chairwoman moved to find that both parties to the appeal stipulated that the local board applied their zoning procedures evenly to both subsidized and unsubsidized housing applications. Motion passed unanimously. The Chairwoman moved to find that the developer presented sufficient proof to obtain master plan level approval, subject to further review of all sewer capacity issues during preliminary and final review. Motion passed unanimously. Mr. Maynard moved to vacate the zoning board's decision to deny the application and grant master plan approval, subject to the applicant providing the Town of Smithfield with evidence during preliminary plan review that the sewage disposal system will function properly. Motion passed unanimously. Mr. Ostiguy moved to find that the evidence showed the intent of the developer to integrate the low and moderate income units with the market rate units. Motion passed unanimously.

Adjournment

The meeting adjourned at 4:38 p.m.

Respectfully submitted,

Mary B. Shekarchi, Esq.

Chairperson